

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK HENRY NIX IV,

Defendant-Appellant.

UNPUBLISHED

March 29, 2007

No. 263642

Macomb Circuit Court

LC No. 04-004295-FC

Before: Owens, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Defendant was charged with four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (victim under 13), MCL 750.520b(1)(b)(victim 13 to 16 and family relationship), and two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (victim under 13), based on allegations of repeated sexual assaults of defendant's cousin in defendant's parents home in Macomb Township. He was found not guilty of the first-degree criminal sexual conduct charges, and guilty of the second-degree criminal sexual conduct charges. Defendant was sentenced to five years' probation, with the first twelve months to be served in the Macomb County jail, and the second year on a tether. He appeals as of right, and we affirm.

The complainant testified that the assaults began when defendant was approximately 15 years old and the complainant was ten years old. The complainant testified that defendant groped his genital area on the outside of his clothing when the adults in the house were not around. He further testified that on multiple occasions defendant coerced him to manually stimulate defendant's penis in exchange for defendant allowing him to play a video game and that defendant watched pornographic videos with him in defendant's bedroom in the basement of the home. Defendant and the complainant engaged in manual stimulation and digital penetration while viewing the videos. The complainant also recounted that he and defendant manually stimulated each other after defendant had given the complainant a back massage. Defendant's theory of defense was that the complainant fabricated the allegations, which were uncorroborated.

Defendant first argues that he was denied his state and federal constitutional due process rights, and his right to notice of the charges against him, because the charges of which he was convicted in the amended information varied with the proofs at trial and the jury instructions. We disagree. Because defendant did not raise this issue in the trial court, it is not preserved for appellate review. *People v Bauder*, 269 Mich App 174, 177; 712 NW2d 506 (2005). As such,

our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999). Reversal is warranted only if the error resulted in conviction despite defendant's actual innocence or if it seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of his innocence. *Id.* at 763.

Defendant takes issue with the fact that although the amended information alleged offenses occurring in Macomb Township, other acts evidence at trial described conduct occurring in Shelby Township and Clinton Township, and the jury was not instructed to limit its findings to acts occurring in Macomb Township. Thus, defendant contends that there was a fatal variance between the proofs at trial and the offenses alleged in the amended information. Defendant also argues that the complainant's testimony regarding acts committed in Macomb Township was general and nonspecific.

MCL 767.45 provides in relevant part:

(1) The indictment or information shall contain all of the following:

(a) The nature of the offense stated in language which will fairly apprise the accused and the court of the offense charged.

(b) The time of the offense as near as may be. No variance as to time shall be fatal unless time is of the essence of the offense.

(c) That the offense was committed in the county or within the jurisdiction of the court. No verdict shall be set aside or a new trial granted by reason of failure to prove that the offense was committed in the county or within the jurisdiction of the court unless the accused raises the issue before the case is submitted to the jury.

Here, the amended information alleged that defendant committed two counts of second-degree criminal sexual conduct involving the complainant in Macomb Township between September 1, 1999, and 2003. The proofs at trial comported with the amended information.

The complainant testified regarding numerous instances of sexual contact occurring at defendant's home in Macomb Township. The complainant testified that during the school year following his tenth birthday, defendant manipulated him to "jack [defendant] off" in order for defendant to allow the complainant to play a video game. Defendant also watched pornographic videos with the complainant while engaging in this activity. The complainant further testified that defendant asked the complainant to "jack him off" after defendant gave the complainant a back massage. After the complainant complied with defendant's request, defendant manually stimulated the complainant. In addition, the complainant testified regarding another occasion on which defendant refused to allow him to play a video game unless he manually stimulated defendant's penis. All of these incidents occurred in Macomb Township at defendant's residence. Further, the complainant testified that defendant used video games to coax him into manually stimulating defendant when he was between ten and twelve years old. Thus, this conduct occurred between 1999 and 2001.

Although the prosecutor presented evidence of other sexual acts between defendant and the complainant that occurred in Shelby Township and Clinton Township, the evidence discussed above regarding acts occurring in Macomb Township comported with the amended information. Thus, contrary to defendant's argument, the proofs at trial did not vary with the offenses alleged in the amended information. Further, also contrary to defendant's argument, the complainant's testimony regarding the Macomb Township acts was not general and nonspecific, but rather, specifically indicated where the conduct occurred and what it involved.

Defendant also argues that the trial court failed to instruct the jury to limit its considerations to acts alleged to have occurred in Macomb Township, but rather, instructed the jury that it must be convinced that the acts occurred in Macomb County generally. Although the trial court erred in saying "Macomb County" rather than "Macomb Township," the error did not deprive defendant of due process. Both the prosecutor and defense counsel informed the jury that only conduct alleged to have occurred in Macomb Township was at issue, and the trial court instructed the jury not to consider alleged sexual conduct for which defendant was not on trial. Further, there is no reason to believe that the jury believed that defendant committed acts constituting second-degree criminal sexual conduct in Clinton or Shelby Township, but not in Macomb Township. Accordingly, defendant has failed to establish plain error affecting his substantial rights.

Defendant next argues that the prosecutor's comments during closing argument denied him his right to a fair trial. We again disagree. Generally, we review claims of prosecutorial misconduct de novo to determine whether a defendant was denied a fair and impartial trial. *People v Cox*, 268 Mich App 440, 450-451; 709 NW2d 152 (2005). However, because defendant failed to preserve this issue for appellate review by objecting to the alleged instances of prosecutorial misconduct on the same basis that he asserts on appeal, our review is limited to plain error affecting defendant's substantial rights. *Id.* at 451; see also *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). "When reviewing a claim of prosecutorial misconduct, we examine the pertinent portion of the record and evaluate a prosecutor's remarks in context." *Cox, supra*.

Defendant argues that the following remarks during the prosecutor's closing argument, quoted in context, improperly commented on his constitutional right not to testify:

The question in this case is did you believe [the complainant] when he testified before you or not. That really is the ultimate question. If you believed him, you should convict the defendant. No other corroboration is necessary. The judge is going to instruct you. If you didn't believe him, you'll acquit the defendant.

* * *

Why would [the complainant] lie about this whole case and all of these accusations that he's making against his cousin Patrick Nox [sic] and cause himself so much pain and humiliation and embarrassment

* * *

Well, you might think the complaining witness has nothing to lose by saying this happened, nothing at all. Well, he's lost his privacy, he's lost his dignity. And what does he have to gain by coming in here by telling all of this if it's not true?

Look at the other side of the coin, the defense. What does the defendant have to gain or lose?

A prosecutor may not comment on a defendant's decision not to testify at trial. *People v Kevorkian*, 248 Mich App 373, 433; 639 NW2d 291 (2001). We disagree with defendant's characterization of the above remarks as commenting on his right not to testify. Rather, the prosecutor was arguing that defendant had a motive to lie regarding whether the alleged conduct occurred, while the complainant did not. Because the prosecutor's comments did not imply that she had special knowledge regarding the complainant's truthfulness, the remarks were not improper. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). Accordingly, defendant has failed to establish plain error affecting his substantial rights.

Defendant also argues that the prosecutor committed misconduct by comparing him to famed serial killer Ted Bundy. Defendant challenges the following remarks:

Now, you might look at defendant sitting here today and say but he looks so innocent, he just looks like a nice guy. Well, if we could just look at someone and say he's a child molester, no, he's not a child molester, we wouldn't need you sitting here today as a jury

Just remember that evil men can disguise themselves with the faces of angels. If you think of Ted Bundy who was able to lure a lot of people into, woman [sic], people, into his car in Florida. You can't be fooled by the way he looks. You can't judge this case just on the way the defendant sits here and looks.

We again disagree with defendant's characterization of the prosecutor's comments. Contrary to defendant's argument, the prosecutor was not comparing him to Ted Bundy, but rather, was merely arguing that defendant's guilt or innocence could not be determined based on his appearance. Thus, defendant has not shown plain error affecting his substantial rights.

Affirmed.

/s/ Donald S. Owens

/s/ Joel P. Hoekstra